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No. 953

In the

Supreme Court of the United States

OCTOBER Term, 1963

THE PRESIDENT OF INDIA, acting by and through THE DIRECTOR OF THE INDIA SUPPLY MISSION,
Petitioner,

vs.

WEST COAST STEAMSHIP COMPANY, an Oregon corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

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THE PRESIDENT OF INDIA, acting by and through THE DIRECTOR OF THE INDIA SUPPLY MISSION,
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vs.

WEST COAST STEAMSHIP COMPANY, an Oregon corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Sovereign Republic of India, represented by its President as Petitioner acting by and through the titular head of the India Supply Mission, a subdivision of the corporate Sovereign, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 15, 1964.

OPINIONS BELOW

The opinion of the District Court (R 74) printed in Appendix A hereto (post 11) is reported at 213 F Supp 352 (D Or 1962). The opinion of the Court of Appeals, printed in Appendix B hereto (post 34), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1964 (post 34). This Court has jurisdiction under 28 USC § 1254(1).

The District Court had jurisdiction under 28 USC § 1333(1). The Court of Appeals had jurisdiction under 28 USC §§ 1292(3) and 1294(1).

QUESTIONS PRESENTED

1. Is an American merchant vessel which is not equipped with radar or loran unseaworthy as a matter of law for an intended voyage through the Sulu Sea, where the waters are dangerous and there are no alternative aids to navigation?

2. Do new proven and reliable navigational devices become essential to seaworthiness only when their use is dictated by custom and practice of the industry, without regard to their availability, cost or utility in avoiding the risks of an intended voyage through dangerous waters?

STATUTES INVOLVED

The statute involved is 46 USC § 1300 (The Carriage of Goods by Sea Act, which is printed in Appendix C hereto (post 36)).

STATEMENT OF THE CASE

In the early morning hours of January 5, 1961, in the course of an intended voyage through dangerous waters of the Sulu Sea in the Philippine Archipelago, the SS PORTLAND TRADER, on time charter from respondent to petitioner, stranded on the Tubbataha Reef, causing extensive damage to the cargo.

Situated on the Tubbataha Reef (which had been described in the Sailing Directions as extensive and dangerous—in fact the Trial Court found (R 76) that the waters were known to be dangerous) was an abandoned lighthouse some 130 feet in height. The lighthouse was situated in the approximate center of the Sulu Sea, the passage through which required some 30 hours of dead reckoning. It was for this lighthouse that the Master was searching when the vessel went aground as the Master was not sure of his position. It was necessary for him to locate this lighthouse in order to accurately chart his position in the Sulu Sea as the dangerous straits at Balabac where the navigating lights had been extinguished lay ahead (this manuever had been suggested by respondent-shipowner following an earlier loss of one of its vessels on the same route.)

The voyage took place during the monsoon season when, because of overcast skies, it was difficult for the Master to ascertain his position by celestial navigation.

It was this seasonal atmospheric condition which prevented the Master from accurately determining his position before the stranding.

The navigational equipment aboard the vessel, the Radio Directional Finder, was ineffective as there was no RDF coverage in the Sulu Sea. The Fathometer was ineffectual because of the great depth of the water.

The respondent-shipowner knew that in all probability the vessel would traverse the Sulu Sea but did not equip its vessel with radar,[1] which would have disclosed the presence of the lighthouse at a distance of approximately 15 miles (RTR 96, 7 and 8) (the stranding took place within 3 miles of the lighthouse, RTR 103,4), or loran,[2] which was operative in the area and would have enabled the Master to obtain his position to a degree of accuracy less than one mile.

Respondent-shipowner knew that the lights had been extinguished in the area of the Sulu Sea. The cur-

1. A development of World War II whereby pulses of ultra-high frequency radio waves emitted by a transmitter aboard ship are reflected by solid objects and are detected upon their return by the sending station. It gives a visual picture of objects projecting above the surface of the sea, and affords the navigator a picture of nearby obstacles, such as ships and rocks, showing their range and bearing.

2. A system of radio navigation developed during World War II. It derives its name from "Long Range Aid to Navigation." High Frequency radio signals emitted simultaneously by two loran transmitter stations ashore, separated by about 400 miles, are received aboard ship in a loran receiver, which determines with a high degree of accuracy the difference in time at which the two signals are received. Curves printed on a navigation chart show loran lines of position for various time differences. In an area blanketed by loran signals, the navigator using the receiver can determine several lines of position. Their intersection gives him the location of his vessel.
33 CFR 62.40-1262.40-20

rents were inadequately reported on the charts and the numerous reefs had not been accurately charted.

This libel was brought to recover for the resulting damage to the cargo. The trial court found and concluded that the vessel was seaworthy and that the Master's negligence was the sole cause of the loss. It held that radar and loran were valuable aids to navigation (R 78) but would become essential to seaworthiness only when their use should be the subject of established custom and practice in the industry, and that none had been proved by libelant. The Court of Appeals affirmed without opinion.

REASONS FOR GRANTING THE WRIT

I.

The question whether a vessel destined for dangerous waters must to be seaworthy be equipped with radar or loran is of great importance to the maritime industry and is critical to the protection of ships, their cargoes and the lives of their Masters and crews. The proposition that new navigational devices become essential to the seaworthiness of the vessel only upon proof of a custom and practice in the industry to use them constitutes a dangerous innovation in admiralty law and is inconsistent with the decision of this Court in *Salem v. U.S. Lines Co.*, (1962) 370 US 31 at 37 fn 6.

THE TRADITIONAL TEST OF SEAWORTHINESS IS WHETHER THE VESSEL IS REASONABLY FIT TO CARRY THE CARGO WHICH SHE HAS UNDERTAKEN TO TRANSPORT.[3]

The criterion is not custom and practice but a judicial consideration of the dangers inherent in the intended voyage, the risks involved, the value of electronic navigation as a means of avoiding those risks and dangers, the value of these cargo and lives of the crew balanced against the cost of the valuable aids to navigation.

The Court below held that neither radar nor loran would be necessary for a safe voyage in absence of industry custom and practice (R 80).[4]

What constitutes reasonable care and due diligence must be determined not by what is customarily done but by what ought to be done under all the circumstances. (*Texas & Pacific Ry. Co. v Behymer* (1902) 189 US 468).

Industry practice is not the test of seaworthiness. *Rodriguez v Coastal Ship Corp.*, US DC SC NY (1962).

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3. THE SILVIA (1898) 171 US 462, 464.

4. The lower Court rejected the testimony: (1) more cargo vessels than not were equipped with radar (RTR 524, American Merchant Marine Institute); (2) the number of marine radar transmitters licensed by the Federal Communications Commission exceeded by more than 4 times the number of vessels in the American Merchant Marine (not included in this computation are vessels of the United States, which are not required to be licensed) (R 23, Exh 118b, Marine Research Program, Vol 2 p 31); (3) "Either by international agreement or by universal practice, practically all ocean-going vessels of today carry at least the conventional radio telegraph, Radio Directional Finder and radar", (House Report No. 2969, 84th Congress, Second Session, Safety of Life at Sea Study).

1963 AMC 1831; *Davis v. Parkhill-Goodloe Company* (CA 5, 1962), 302 F2d 489 at 493. The shipping industry must be prevented from hoisting itself by its own bootstraps through the device of setting up standards of conduct amounting to something less than reasonable care under the circumstances and then predicating the defense of seaworthiness upon such legally insufficient substandards of care.

II.

The decision below conflicts with the leading decision of *THE T. J. HOOPER*, (CA 2) 60 F2d 737, affg 53 F2d 107, and this conflict should be resolved.

In the infant years of electronics, *THE T. J. HOOPER* became a landmark decision because it held there was a duty on the part of tug owners to supply effective radio sets although there had been prior to that time no duty, statutory or otherwise, requiring a radio receiver.

The decision in the instant case holding that any navigational device can only be essential to seaworthiness upon proof of industry custom and practice is in direct conflict with *THE T. J. HOOPER*, and in direct conflict with the time-honored and traditional tests of seaworthiness.

> "* * * The standard of seaworthiness is not, however, dependent on statutory enactment, or condemned to inertia or rigidity, but changes with ad-

vancing knowledge, experience, and the changed appliances of navigation.' * * *" *THE T. J. HOOPER*, 53 F2d 107, 111

To deny certiorari will retard if not prevent progress in the development and adoption of electronic aids to navigation and progress in safety of life and property at sea.

The Supreme Court must examine the need for radar and loran in known dangerous waters where no aids to navigation are maintained.

III.

The holding below that a vessel destined for dangerous waters where there are no aids to navigation is seaworthy without radar or loran is inconsistent in principle with the established rule that the failure to use radar, if available, is gross fault.

Since 1942, no Court has criticized the value of radar or the necessity for its use.[5] In collision cases particularly, the failure to use the judicially determined valu-

5. For example *Placid Oil Company v S. S. WILLOWPOOL* (DCED Texas 1936) 214 F Supp 449; the *CHUSAN* (1955) 2 Lloyd's List, LR 685; *Afran Transport Co. v The BERGECHIEF* (CA 2 1960) 247 F2d 469; *Farrell Lines, Incorporated v The S/S BIRKENSTEIN* (DCSDNY 1962) 207 F Supp 500; *Villain & Fassio E. Compagnia v Tank Steamer E. W. SINCLAIR* (DCSDNY 1962) 207 F Supp 700, aff'd (CA 2 1963) 313 F2d 722; *Continental Oil Company v M. S. GLENVILLE* (DCSD Texas 1962) 210 F Supp 865; *Wuerttemberg-Swerve*, (DC ED SC Charleston Division, June 10, 1963) AMC 1554.

able instrument of radar has been held to be a gross and glaring fault.

The Second Circuit referring to the need of radar in light of *THE T. J. HOOPER* has stated: *Afran Transport Co. v The Bergechief*, (CA 2 1960) 274 F2d 469, 479.

> "* * * Lurking in the background is T. J. Hooper, 2 Cir., 1932, 60 F.2d 737, certiorari denied, Eastern Transportation Co. v. Northern Barge Corp., 1932, 287 U.S. 662, 53 S.Ct. 220, 77 L.Ed. 571, where in 1932, despite the absence of statutes, regulations or even custom as to radio receiving sets, Judge Learned Hand found a vessel unseaworthy for lack of one. * * * We think this case shows which way the wind blows and have little doubt that a rule requiring radar, subject to some limitations and qualifications, will sooner or later be formulated. But we do not decide the point as it is not necessarily involved in this case."

The instant case has like language:

> "* * * I would be one of the first to recognize that in the not too distant future the absence of such navigational aids [radar or loran] on such ships might well make them unseaworthy. * * *". (R 82)

The Supreme Court must review the decisions below and determine when and under what circumstances radar and loran are to be required for dangerous voyages as the safety of lives and goods at sea is of paramount importance not only to the maritime industry but to the public as well.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue to review the judgment rendered by the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

THE PRESIDENT OF INDIA; acting by and through THE DIRECTOR OF THE INDIA SUPPLY MISSION, *Libelant*, vs. WEST COAST STEAMSHIP COMPANY, an Oregon Corporation, *Respondent*.	In Admiralty Civil No. 61-274 OPINION

KILKENNY, J:

Libel in admiralty for damages by the owner of certain cargo which was lost or damaged while aboard the SS PORTLAND TRADER, a vessel owned by respondent and, at the time of the occurrence, operated under a certain Charter Party between libelant and respondent.

The TRADER was an ocean-going vessel of the Liberty type purchased by respondent for a sum in excess of $500,000. The vessel was of 7,251 tons gross and 4,455 tons net, with a crew, including officers, of 38. The Charter Party was executed in October, 1960, and, in accordance with its terms, approximately 9,800 long tons of bulk wheat in good order and condition was

loaded aboard the TRADER at Vancouver, Washington, in December, 1960, for delivery to libelant in Calcutta, India. The TRADER departed on its voyage on that day and on or about the 5th day of January, 1961, while traversing the Sulu Sea, Republic of The Philippines, she came in contact with an undercropping of the Tubbataha Reef, which contact resulted in the propeller of the vessel being bent so that it would not pass the rudder. This occurred at approximately 0200. The vessel drifted free of the Reef for approximately 3½ hours, at which time it again struck the Reef and grounded. The master of the TRADER, one Hansen, had been employed by respondent for approximately 9 years prior to the casualty. This was his second voyage as master and his first voyage as master through the Sulu Sea. The vessel was equipped with neither radar[1] nor loran.[2] The Sulu Sea in which the damaging reef was located was, at the time of the occurrence, blanketed by loran signals from several transmitters. The TRADER was equipped with a radio direction finder, but

1. A development of World War II whereby pulses of ultra-high frequency radio waves emitted by a transmitter aboard ship are reflected by solid objects and are detected upon their return by the sending station. It gives a visual picture of objects projecting above the surface of the sea, and affords the navigator a picture of nearby obstacles, such as ships and rocks, showing their range and bearing.

2. A system of radio navigation developed during World War II. It derives its name from "Long Range Aids to Navigation." High Frequency radio signals emitted simultaneously by two loran transmitter stations ashore, separated by about 400 miles, are received aboard ship in a loran receiver, which determines with a high degree of accuracy the difference in time at which the two signals are received. Curves printed on a navigation chart show loran lines of position for various time differences. In an area blanketed by loran signals, the navigator using the receiver can determine several lines of position. Their intersection gives him the location of his vessel.

there was no RDF coverage which blanketed the area through the Sulu Sea. This fact was known to the Captain and also to the respondent. The Captain had received training as a radar observer, obtaining his master's license in 1958. The A-1 classification given the ship by the American Bureau of Shipping does not carry with it anything with reference to electronic aids to navigation and does not indicate whether a ship has or does not have radar or other aids.

The official map of the United States Coast Guard & Geodetic Survey shows that at least as early as 1939 the very sea lane which was being followed by the TRADER was designated as a recommended steamer route through the Sulu Sea. These waters were known to be dangerous, but no more so than many other well recognized sea lanes throughout the world. For more than a century the lane has been recognized as one for sea traffic between the Hawaiian Islands and Singapore.

Some hours after another ship took the majority of the crew, the Captain and the remainder of the crew abandoned ship. This was approximately 6:00 p.m., ship's time. After the vessel grounded on the Reef, its hull was so damaged that sea water entered the cargo holds and the cargo sustained substantial damage. A salvaging operation saved a portion of the cargo which was later transferred to its destination.

The above statement, although skeleton in nature, is sufficient to give an outline of the facts involved.

The only issue before the Court at this time is that of liability.

My ultimate conclusions must be governed by the Carriage of Goods by Sea Act, known as COGSA, 46 U.S.C. §§1300-1315. Under the provisions of that Act the libelant here made a prima facie case by proving receipt by the TRADER of the goods in good order and the fact that the goods were damaged by the leakage of water into the hold of the vessel. From that point the TRADER must explain the reason for the damage to the goods.

LIBELANT'S CONTENTIONS

Libelant contends that the loss and damage to the cargo was proximately caused by the unseaworthiness of the vessel and by the personal acts, defaults and negligence of respondent in the following particulars: (a) the vessel was unseaworthy in that it was not equipped with radar; (b) the vessel was unseaworthy in that it was not equipped with loran; (c) respondent permitted the master, who was unfamiliar with the area, to sail the vessel into and through the Sulu Sea, knowing the same to be dangerous waters when the vessel was not equipped with either loran or radar; (d) respondent failed to give the master specific instructions for making

a safe voyage through the Sulu Sea; (e) respondent failed to take any precautions whatsoever to safeguard the cargo after it had been advised by radio communication that the vessel had damaged its propeller and was adrift; (f) respondent was further guilty of negligence in that prior to the instant voyage it deliberately chose not to equip the vessel with loran, knowing the probable route which the vessel would take, i.e., the Sulu Sea; and (g) respondent was further guilty of negligence in that prior to the instant voyage it deliberately chose not to equip the vessel with radar, knowing the probable route which the vessel would take, i.e., the Sulu Sea.

Respondent denies that the vessel was unseaworthy or that it was negligent, and affirmatively alleges that the vessel was seaworthy, that respondent was not negligent, that the vessel was seaworthy in all respects as required of respondent under the Charter Party, the Bill of Lading, the Contract of Affreightment and under the Carriage of Goods by Sea Act; that the casualty was occasioned without the privity or knowledge of the respondent, and that the casualty was the proximate result of a cause for which the respondent was not responsible, by reason of the Carriage of Goods by Sea Act,[3] the Bill of Lading, the Contract of Affreightment

3. 46 U.S.C. §1304

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

or the Charter Party, in that the act, default or neglect, or error of judgment, of the master, mariner, pilot or those in charge of the ship, was the sole cause of the disaster. Respondent charges that the master failed to maintain a proper lookout; failed to maintain a proper control of the vessel; navigated the vessel at a speed that was excessive, considering the conditions then and there attendant; attempted to locate an unlighted light tower on a reef in conditions of darkness and poor visibility; failed to stop the vessel; failed to await daylight hours before attempting to locate the unlighted light tower; navigated the vessel so as to cause her to strand; and turned the vessel from a safe position into the face of a known hazard.

SEAWORTHINESS

The first question presented is whether the absence of radar, or loran, rendered the vessel unseaworthy and, if so, whether such unseaworthiness was the proximate cause of the damage to the TRADER. The evidence is clear that both radar and loran are valuable aids to navigation. The vessel was equipped with all navigational aids which had been commonly used over the centuries.

With the brilliant clarity of hind sight, it is now easy to rationalize how the disaster could have been avoided if the vessel had been equipped with either one of these

modern aids to navigation. However, it is my duty to determine the seaworthiness of the vessel from the standpoint of the commencement of the voyage rather than measuring the standard by what happened at the time of the occurrence.

Although the duty to furnish a seaworthy ship is absolute and is a species of liability without fault, limited neither by concepts of negligence nor by those which might be contractual in nature, *Seas Shipping Co., Inc. v. Sieracki*, (1946) 328 U.S. 85; *Mahnich V. Southern S.S. Co.*, 321 U.S. 96, the obligation does not require the owner to furnish a ship or gear beyond that which is reasonably fit for the use intended. In other words, the standard is not an accident-free ship, nor an obligation to provide a ship or gear which might withstand all conceivable hazards. In the last analysis, the obligation, although absolute, means nothing more or less than the duty to furnish a ship and equipment reasonably suitable for the intended use or service. *Mitchell V. Trawler Racer, Inc.*, 362 U.S. 539; *Boudoin v. Lykes Bros. S.S. Co., Inc.*, 348 U.S. 336; *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325.

Another statement of the doctrine is that the standard is not perfection but reasonable fitness. It does not require a ship which will weather every conceivable storm or withstand every imaginable peril of the sea, but only a vessel reasonably suitable for the particular

service. *Mitchell v. Trawler Racer, Inc.*, supra. In examining the facts in this case we must keep in mind that the ship owner's warranty of seaworthiness does not extend to the negligent use of what would otherwise be a seaworthy ship or appliance. *Billeci v. United States*, 298 F. 2d 703 (9 Cir., 1962).

The overwhelming weight of the evidence in the case is that there is no worldwide or American practice or custom with reference to the use of radar or loran as aids to navigation. Improvements in the means and modes of navigation frequently require new implements or new forms of old ones, and these, though not necessary at first, become so when there is an established usage on ships of a certain quality, or those to be sent on certain voyages or used for certain purposes. *THE SOUTHWARK*, 191 U.S. 1. Here, we have no well established usage. Some companies use radar or loran; others do not. The evidence shows that none of the hundreds of Liberty ships built during the war, originally carried either loran or radar. Some have been so equipped in recent years. Most of those engaged in the tramp trade, such as the TRADER, were not so equipped. Libelant's proctor makes a vigorous, incisive and impressive presentation of his theory that the Court should follow the reasoning of Judge Learned Hand in *THE T. J. HOOPER*, 60 F. 2d 737, and hold that either radar or loran or both were indispensible aids to the proper

navigation of the TRADER on the particular voyage and that the absence of either one or both rendered the ship unseaworthy. The precise meaning and overall judicial effect of Judge Hand's decision in *HOOPER* is in serious dispute in the Circuit of its origin. *Nuzzo v. Rederi*, 304 F. 2d 506, 510 (2 Cir., 1962), and dissenting opinion of Judge Clark, 511. Be that as it may, I believe in Judge Hand's truism that the courts must in the end fix the standards of what is or is not a seaworthy ship.

It is interesting to note that Judge Hand, the author of *THE HOOPER* opinion, gives full recognition to the rule of law that advances in science, as such, do not make once seaworthy ships unseaworthy. It was his opinion that ships which were well built in their time might still carry cargo unless they became so clearly out of fashion as to be anachronism. *Spang Chalfant & Co., Inc. v. Dimon Steamship Corp.*, 57 F. 2d 965 (2 Cir., 1932). This case is cited with approval by then District Judge Skelly Wright in *Hendry Corporation v. Aircraft Rescue Vessels*, 113 F. Supp. 198 (D.C. La., 1953), wherein Judge Wright held that the mere absence of a radio on a tug did not make her unseaworthy. Judge Wright's decision was over twenty years subsequent to the decision of Judge Hand in *THE HOOPER* case. Other cases indicating that the absence of radar does not, per se, render a ship unseaworthy are: *Anglo-Saxon Petroleum Co. v. United States*, 88 F. Supp. 158 (D.C. Mass.,

1950); *Timur Fishing Corp. v. Cap'n Bill, Inc.*, 160 F. Supp. 563 (D.C. Mass., 1958).

We must start with a premise that both parties, under the undisputed evidence, were of the belief that the ship was sound in every respect and fit for the voyage. This fact, of course, is in no way controlling. Likewise, the opinion evidence, both libelant's and respondent's, although helpful, is highly disputed and, for the most part, touches on the very issue to be decided by the Court. The ultimate conclusion on seaworthiness is for the trier of the facts rather than experts. *Salem v. United States Lines*, (1962) 370 U.S. 31, 35. In my opinion, this is not one of the rare cases where the ultimate conclusion must be based on expert testimony. To arrive at a proper conclusion the Court must recognize that for thousands and thousands of years men went down to the sea in ships without navigational aids such as radar or loran. There was no general movement toward the use of this equipment until well after World War II and into the mid Fifties. With all of the time tested aids which a mariner has had available over the course of the years, can it now be said that his ship is made unseaworthy by reason of the absence of either radar or loran?

It is clear that neither radar nor loran were ever meant to supersede or replace time honored navigational aids and naval equipment such as that with

which the TRADER was equipped. This does not mean that the navigator may ignore or make improper use of radar equipment which he may have aboard and such misuse of radar may be a foundation for a finding of negligence leading to liability. *Anglo-Saxon Petroleum Co. v. United States*, supra. Without making a written analysis of all of the authorities cited by libelant and respondent, it is my considered judgment that the employment of radar, in connection with the navigation of tramp steamers under the facts and circumstances here in question, is still in a period of transition and at the time of this occurrence was not so essential to navigation that its absence would give rise to a finding of unseaworthiness. I make the same finding with reference to the absence of loran. That fact did not create an unseaworthy condition. I would be one of the first to recognize that in the not too distant future the absence of such navigational aids on such ships might well make them unseaworthy, and I take full and complete recognition of the rule that the standard of seaworthiness is not "condemned to inertia or rigidity, but changes with advancing knowledge, experience and the changed appliances of navigation." *THE T. J. HOOPER*, supra.

Likewise, under all of the facts in this case, I find that the master was a trained seaman with a sufficient background in the ways of the sea to justify respondent

in placing the TRADER under his command and that the instructions given the master by respondent were sufficient for the intended voyage.

NEGLIENCE AND DUE DILIGENCE

The charges of negligence that respondent failed to equip the vessel with loran or with radar, knowing that the probable route of the vessel was through the Sulu Sea, must fail on essentially the same grounds as the failure to establish unseaworthiness by the absence of the same instruments. Under all of the evidence in this case, *viva voce* and otherwise, I find that respondent was not negligent in failing to equip the ship with radar or loran and that a reasonable prudent shipper, in the place of the respondent, would not, in January, 1960, have equipped this tramp steamer for this particular voyage with either of said aids to navigation.

Libelant's proctor makes an able argument in support of his charge that respondent was negligent in failing to instruct its master to take what he claims was the safer route north of Luzon. Libelant's argument is premised, in large measure, on the decision of the Ninth Circuit in *States Steamship Co. v. United States*, 259 F. 2d 158 (9 Cir., 1957). Proctor points to the similarity in circumstances of the owner in *States Steamship* case knowing that the ship was setting out in what was the coldest month of the year on a route which was through

an area where it was likely to encounter extreme cold and high seas and the knowledge of respondent in this case that the ship was proceeding through the waters of the Sulu Sea. In *States Steamship* the vessel was "crack sensitive" and the libelant compares that type of a ship with a ship lacking either radar or loran plying those waters and then charges the respondent with negligence on its failure to instuct the master not to go through that Sea but use the sea lanes to the north of Luzon. As part of his argument, counsel points to the fact that the PACIFIC TRADER, another vessel of respondent's, went aground in September, 1959 in the westerly part of the Sulu Sea. The undisputed evidence in this case is that the Master was familiar with that disaster and exercised his own discretion in taking the Sulu Sea route. Respondent did not attempt, in any way, to interfere with that discretion. The evidence shows that the Master traversed a recognized steamer route and had the same knowledge of the problems of that route as had the respondent. It is a general rule that where an owner has appointed a competent Master, such owner is entitled to rely on the Master's judgment in the navigation of the ship and should not hamper the further exercise of his judgment with instructions and orders. The *G. K. WENTWORTH*, 67 F. 2d 965 (9 Cir., 1933); *Denholm Shipping Co. v. Hedges*, 34 F. 2d 572 (2 Cir., 1929); *THE ORITANI*, 40 F. 2d 522 (3 Cir., 1929).

There is nothing in the record which would indicate that the respondent was under a duty to give specific or other direction to the Master to sail the ship north of Luzon. Substantial evidence would indicate, and I find, that a ship taking that route would encounter dangers just as great as a ship taking the regular steamer route through the Sulu Sea. Even the clarity of hind sight is of no help to respondent on this charge.

In all of my approaches to a solution of the problems involved in this cause, I have kept in mind and invoked the general rule that under COGSA, 46 U.S.C. 1303, 1304, the burden of proof to establish seaworthiness or the exercise of due diligence is on the respondent, and, furthermore, the trier of the facts must be convinced beyond a substantial doubt that the vessel was in fact seaworthy and the owner free from negligence. *THE INDIEN*, 71 F. 2d 752 (9 Cir., 1934); *The Daido Line v. Thomas P. Gonzales Corp.*, 299 F. 2d 669, 671 (9 Cir., 1962), and that doubtful issues must be resolved in favor of cargo. *THE SOUTHWARK*, 191 U.S. 1; *Artemis Maritime Co., Inc., v. Southwestern Sugar & Molasses Co., Inc.*, 189 F. 2d 488 (4 Cir., 1951). I have no doubt that the TRADER was seaworthy in all respects and that the owner used due diligence and was free from negligence in equipping and manning the ship and has met the burden required under COGSA.

Respondent's claim that libelant, by reason of the provisions of the Charter Party, waived its right to claim unseaworthiness or want of due diligence is without merit. The particular form of Charter is known as a Voyage Charter in which a ship is engaged to carry a full cargo on a specific voyage. The vessel, in such case, is *manned and navigated* by respondent. Gilmore & Black, Admiralty (1957), p. 171. The certificate of seaworthiness would not, in itself, prove that the ship was seaworthy or defeat libelant's claim. *Artemis Maritime Co., Inc. v. Southwestern Sugar & Molasses Co., Inc.*, 189 F. 2d 488 (4 Cir., 1951); *Bank Line Limited v. Porter*, 25 F. 2d 843, 845 (4 Cir., 1928). If, in fact, the TRADER was unseaworthy, certificates of surveyors and inspectors should be disregarded. I have not considered such certificates in arriving at my conclusions.

Great importance, argues the libelant, should be placed on the fact that the ship's logs, other than the smooth log, were not produced in Court. The great weight of the evidence on this subject is that respondent made every effort, even to the extent of sending one of its officers to the Philippines, to recover these logs. The Master, in an attempt to conceal his lack of due care at or immediately before the grounding, might have had good reason to dispose of the missing logs. Conversely, the respondent would have no good reason for concealing, destroying, or failing to produce these logs. The

rule which libelant attempts to invoke cannot be utilized under these circumstances.

CARE OF CARGO

Aside from the negligence charged to respondent in connection with the grounding of the vessel the libelant argues, with considerable vigor, that respondent, after being advised of the disaster, improperly assumed control of the situation and, by giving unreasonable and restrictive directions to its Master, negligently permitted the vessel and her cargo from being towed to safety.

It is conceded that respondent had a duty to exercise reasonable care and diligence in preserving the cargo from further damage after the grounding. *The Willdomino*, 300 F. 5 (3rd Cir., 1924); 266 U.S. 597, cert. granted; 270 U.S. 641, cert. dismissed as to cross libel; 272 U.S. 718, affirmed, 46 U.S.C. 1303. Respondent, however, is not liable for the act, neglect or default of the Master of the TRADER in the navigation or in the management of the ship. 46 U.S.C. 1304, (2) (a).

A chronology of what occurred at and for sometime after the original contact with the Reef at 0200 (2 A.M.)[6] is as follows: 0341 the Master advised owners that the ship had struck a Reef and bent the propeller so that it would not pass the rudder, with the vessel adrift not under command but with no bottom on sound-

6. All references to ship's time.

ings. At 0359 the ship sent a message to the Manila agent to the same effect. At 0701 the owners in Portland received the message from the ship. At 0848 the ship sent a message to Iloilo advising that TRADER was lying along east side of Tubbataha Reef. At 0855 owners sent a message to ship, received by ship at 1201. At 0857 the TRADER sent an SOS indicating it required immediate assistance to remove crew. At 0955 the ship sent the first message to the owners which would indicate that the ship had drifted into and was pounding against the Reef and had developed a small fracture in the engine roof. This message was not received by respondent until 1208. At the same time the ship sent a message to the Manila agents advising that the ship was pounding against the Reef, that the vessel was not taking water and that the vessel had an even keel with no list. At 1002 the Manila agents sent a message to the owners and at 1128 the Manila agents sent a message to the ship. At 1201 the ship received a message from the owners which was sent at 0855. At 1208 the owners received a message from the Master which was sent at 0955 which was the first message which indicated to the owners that the ship was in serious difficulty. Some twenty minutes later, at 1228, the ship sent another message to the owners which asked to advise an acceptable tug rate. This was not received in Portland until 1440. During this period the respondent attempted to

call its agent in Manila and was in constant radio contact with said agent. The exchange started at 1415 ship's time and continued until 1600 ship's time, when respondent directed a message to the Master suggesting a daily tug tate of $2,000.00 but placed final judgment in the Master.[4] As late as 1807 the respondent received a message from the ship advising that certain crew members were aboard the S. S. MARTITA and that the pumps were handling the water from the skin fracture in the engine room. In the meantime, the Master was in radio contact with the Master of the MARTITA on a towing rate and at 1449 the MARTITA advised the Master of the TRADER that it could not accept daily towing rates in response to which the Master of the TRADER gave thanks to the MARTITA for taking the crew. Libelant makes much over the fact that at 1458 the Master of the TRADER sent a message to the NASSA in which he offered $3,000.00 per 24 hours to take the TRADER in tow. At 1502 the final message was received from the MARTITA that it would be on its way. As late as 1519 a message from the TRADER to the NASSA indicated that the engine room was taking only a small amount of water.[5] To be kept in mind, at all times, is the

4 "Messages acknowledged First concern safety you and crew Seapost Manila has arranged tugs with salvage equipment on daily hire for towing purposes only but if salvage required Lloyd's no cure no pay agreement ETA AM 8 Stop However small tug also dispatched from Iloilo ETA Noon 6 Stop Suggest you keep Post contact Seapostes Manila. However, if necessary engage tug or other vessel prior arrival dispatch tug suggest daily rate $2,000 or best terms depending on condition but your judgment must govern stop Acknowledge and keep us advised fully."

5 "• • • taking water engine room slightly, pumps handling O.K. • • •"

fact that there was a transmission delay in the radio messages between the ship and Manila and the West Coast of from 3½ to 4 hours. The most urgent message received by respondent was the one advising that 28 men were transferring to the MARTITA, this message being sent at 1332, a short time before the arrival of the MARTITA, which message was not received by respondent in Portland until long after respondent sent the message at 1600.

When the salvage tug STINGRAY arrived the vessel was still pounding on the Reef and the tug at that time towed the vessel to a sheltered position where repairs were made so that she might later be towed to a salvage station.

At the trial the Master was very positive in his testimony that at the time of the arrival of the MARTITA, the TRADER had suffered so much damage to her hull that it would be a dangerous procedure to accept a line. He testified that he was deeply concerned over the fact that the MARTITA had no salvage equipment aboard and that he desired a Lloyd's open salvage agreement because he was under an obligation to look after the company's interests and the charterer's interest as well as his own. It is difficult to reconcile this testimony with the Master's offer to the NASSA at 1458 of $3,000.00 to take the vessel in tow until the arrival of the salvage tug. Evidently he had difficulty in arriving at a con-

clusion on whether to accept the line and possibly founder in deep water, or permit the ship, with comparative safety, to remain grounded on the Reef. Obviously, the Master was confronted with an extremely difficult decision. His inconsistent actions must be analyzed in the light of the emergency with which he was faced, even this be of his own making. The admitted fact that a large quantity of the cargo was salvaged is strong evidence of the wisdom of permitting the TRADER to remain on the Reef until the arrival of the tug. A careful examination of the testimony on the subject and of all of the messages forces me to the inevitable finding: (1) that on the basis of the knowledge at hand respondent acted as a reasonable, prudent, shipowner would act under like circumstances and conditions, (2) that, with the knowledge at hand, respondent did not give the Master unreasonable or restrictive directions, (3) that the Master exercised his own discretion on whether to accept a tow, and (4) that the sole proximate cause of the damage to the cargo was the negligent acts of the Master prior to and at the time of grounding on the Reef, rather than the acts, omissions or commissions of either the Master or respondent after said grounding.

PROXIMATE CAUSE

At Negros Island on entering the Sulu Sea, the Master obtained a definite fixed position from which he set

a course which he estimated would eventually place him on a dead reckoning basis approximately three miles south of Tubbataha Reef. The Master was attempting to locate the Reef in order to secure a definite fix before sailing through the waters of the Balabac Straits, some considerable distance to the west. This dead reckoning was based on the course the vessel steered and its average speed of 11.5 knots. Some 13½ hours later the Master changed course, but prior to that time he had taken a number of star shots which indicated that he was perhaps a little north of his track. Two hours later he again changed course in trying to locate the Reef. One hour and 40 minutes later another change; 1 hour and 15 minutes later another change; and then 1 hour and 5 minutes thereafter again changed course, and while on this particular course he noticed the waters of the Reef immediately ahead and ordered a hard right, at which time the vessel swung to the right and at approximately 2:00 a.m., and while the vessel was heading 90° true, the propeller fouled on the submerged portion of the Reef. It would therefore appear that for a period of approximately 4 hours the Master made the following changes in direction, in the dead of night, in an attempt to locate this Reef: from 260° true to 254° true; from 254° true to 359° true; from 359° true to 079° true; and from 079° true to 279° true. This clearly indicates that the direction in

which the vessel was sailing was abruptly changed on many occasions during the nighttime in poor visibility while the Master was attempting to locate this Reef. The sailing directions, with which the Master was familiar, described Tubbataha Reef as consisting of two extensive and dangerous reefs. The official charts advised him that at high tide these reefs were practically submerged with four or five feet of water. Armed with such knowledge what would a reasonable, prudent Master have done under like circumstances and conditions? Obviously, a prudent Master would have waited a few hours until daylight and then located the Reef. The few hours wait would be of no significance in the long journey to India. Rather than wait a few hours he adopted the foolhardy and hazardous zig-zag method of attempting to locate the Reef. At that time of night he might as well be attempting to locate the proverbial needle in a haystack. All of this points to exceptionally poor judgment on the part of the Master on this one occasion. This does not mean that respondent knew or by the exercise of reasonable diligence should have known that the Master might "panic" on an occasion such as this. The great weight of the evidence is otherwise. In conclusion, I find, that respondent furnished an adequate and competent crew for the vessel, but that the Master and those under him lost their heads at the time they were making the search for the Tubbataha

Reef and that the Master did not act as a reasonable prudent person would act at the time of such search.

The sole proximate cause of the casualty in this case was the act, neglect and default of the Master in the navigation and management of the ship immediately before and at the time of contact with the Reef.

The written record in this cause, consisting of the Pre-Trial Order, the Exhibits, the Depositions, and the Briefs of proctors, is enormous. It has consumed an immense amount of time to martial the facts, analyze the evidence, and study the briefs. The briefs alone approach 250 typewritten pages. I have not read each case cited by proctors. Each case specially emphasized has received my attention, and, I have read selected cases on each of the several legal issues involved. Libelant's objection to each exhibit on which ruling was reserved is sustained.

This Opinion shall stand as my findings and conclusions. Proctors, if they so desire, may propose additional findings. An appropriate Decree of Dismissal shall be prepared, served, and presented.

DATED December 19, 1962.

JOHN F. KILKENNY

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE PRESIDENT OF INDIA, acting by and through THE DIRECTOR OF THE INDIA SUPPLY MISSION,

Appellant,

vs.

WEST COAST STEAMSHIP COMPANY, an Oregon corporation,

Appellee.

No. 18,567.
Jan. 15, 1964

Appeal from the United States District Court for the District of Oregon

Before: HAMLEY, HAMLIN and KOELSCH, Circuit Judges

PER CURIAM:

The President of the Republic of India, acting by and through the Director of the India Supply Mission in the United States, appellant herein, brought a libel in admiralty against West Coast Steamship Company, appellee herein, as owner of the *S.S. Portland Trader*, for damage to cargo which occurred when the vessel ran aground on Tubbataha Reef in the Sulu Sea, Republic of the Philippines, January 5, 1961. The primary con-

tention of libelant was that the vessel was unseaworthy by reason of its not being equipped with either radar or loran.* District Judge John F. Kilkenny, in a detailed opinion, 213 F. Supp. 352 (D. Ore. 1962), found that the vessel was seaworthy and that the sole cause of the accident was negligent navigation by the master. We think that Judge Kilkenny in his opinion correctly set forth the salient facts, analyzed the issues, and applied the law, and accordingly adopt that opinion as our own.

Judgment affirmed.

(Endorsed) Per Curiam Opinion Filed January 15, 1964.

Frank H. Schmid, Clerk.

* Libellant also contended that respondent was negligent in its instructions to the master after it received notification of the accident.

APPENDIX C

§ 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter. Apr. 16, 1936, c. 229, 49 Stat. 1207.

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except

live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. Apr. 16, 1936, c. 229, § 1, 49 Stat. 1208.

§ 1303. Responsibilities and liabilities of carrier and ship —Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81-124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as

described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.

§ 1304. Rights and immunities of carrier and ship—Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

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In the Supreme Court
of the United States

OCTOBER TERM 1963

No. 953

THE PRESIDENT OF INDIA, ACTING BY AND THROUGH THE DIRECTOR OF THE INDIA SUPPLY MISSION,

Petitioner,

vs.

WEST COAST STEAMSHIP COMPANY, an Oregon corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT WEST COAST STEAMSHIP COMPANY IN OPPOSITION

KENNETH E. ROBERTS
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Portland, Oregon 97204
Proctor for Respondent

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-64

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OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix A-11) is reported at 213 Fed. Supp. 352. The opinion of the Court of Appeals (Petitioner's Appendix B 34-35) is reported at 327 F.2d 638.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1964. The petition for Writ of Certiorari was filed on the 27th of March, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an American Merchant Vessel equipped with all of the time honored traditional navigational aids in 1960 for a voyage to India from the United States of America is unseaworthy as a matter of law because not equipped with radar or loran.

2. Whether the Courts below correctly found that the vessel was seaworthy at the commencement of the voyage and whether the findings of the Courts below were "clearly erroneous."

STATUTES INVOLVED

The statute involved is 46 U.S.C. 1300 (the Carriage of Goods by Sea Act) which is Petitioner's Appendix C.

STATEMENT

This is an action by Petitioner against Respondent to recover damages because of partial loss of cargo on the SS PORTLAND TRADER on a voyage from the United States of America to India.

The SS PORTLAND TRADER was an ocean-going Liberty type vessel and on the 19th of October, 1960 she was equipped with all of the time honored traditional navigational aids (213 Fed. Supp. 356).

On the 19th day of October, 1960 the India Supply Mission, by and through its Deputy Director acting for and on behalf of the President of India, executed a Voyage Charter Party with West Coast Steamship Company and pursuant to the Charter Party and on or about the 5th of December, 1960, approximately 9800 long tons of bulk wheat in good order and condition was loaded aboard the vessel at Vancouver, Washington for delivery in India.

The vessel departed on her voyage on or about the 5th of December, 1960 and the Master of the vessel, exercising his own discretion and judgment and seamanship decided to traverse the Sulu Sea in the Republic of Philippines on the voyage from Honolulu to Singapore (R. 41). Prior to entering the Sulu Sea the Master had decided to obtain a fixed departure from an unused unlighted lighthouse on the south end of Tubbataha Reef (R. 53) and in attempting to locate this Reef, at full speed and in the dark early hours of the morning of January 5, 1961 he stranded his vessel on the southern end of the Reef (R. 58).

Contrary to Petitioner's assertion (Petitioner's Brief 3) the Respondent did not suggest to the Master of the SS PORTLAND TRADER that he locate the lighthouse in the manner in which he did and contrary to Peti-

tioner's assertion (Petitioner's Brief 3) Respondent did not earlier lose one of its vessels on the same route.

The Trial Court found that the waters of the Sulu Sea "were known to be dangerous, but no more so than any other well recognized sea lanes throughout the world" and that for more than a century the route followed by the vessel "had been recognized as one for sea traffic between the Hawaiian Islands and Singapore (213 Fed. Supp. at p. 355).

The charts aboard the vessel were current and up to date, as were the Notice to Mariners and Sailing Directions (R. 79).

The Trial Court found that the vessel was seaworthy and that the Master's negligence *was the sole cause of the loss*. The Trial Court recognized that radar and loran could be valuable aids to navigation and held that their absence did not render the PORTLAND TRADER unseaworthy under the particular facts of the case (213 Fed. Supp. at pp. 357, 362).

The Trial Court recognized the long established rule that the determination of seaworthiness is a question of fact

Luckenbach v. *W. J. McCahan*, 248 U.S. 139 (1918);

Mahnich v. *Southern SS Co.*, 321 U.S. 96, 98, 99 (1944);

Morales v. *City of Galveston*, 370 U.S. 165 (1962).

At the commencement of the voyage of the SS PORTLAND TRADER the evidence clearly indicated

that some vessels were equipped with radar and loran and others were not and in considering the question of navigational equipment aboard a vessel the Court did hear evidence as to the custom and practice of the industry.

Boudoin v. *Lykes Bros. SS Co.*, 348 U.S. 336 (1955);

Metropolitan Coal Co. v. *Howard*, 155 F.2d 780 (C.A. 2, 1946);

United States Steel Products Co. v. *American & Foreign Insurance Co.*, 82 F.2d 752, (C.A. 2, 1936).

The Trial Court did not find as urged by Petitioner that radar and loran would become essential to seaworthiness "only upon proof of a custom and practice in the industry" (Petitioner's Brief 5); it held (213 Fed. Supp. at p. 357):

> "* * * * It is my considered judgment that the employment of radar in connection with the navigation of tramp steamers under the facts and circumstances is still in the period of transition and at the time of this occurrence was not so essential in navigation that its absence would give rise to a finding of unseaworthiness. I make the same finding with reference to the absence of loran.
>
> "The overwhelming weight of the evidence in the case is that there is no world-wide or American practice or custom with reference to the use of radar and loran as aids to navigation." (213 Fed. Supp. 356)

The Court of Appeals Affirmed Per Curiam and adopted the Trial Court's opinion as its own and we submit that the case raises no question of general importance and that further review by this Court is not warranted.

ARGUMENT

Of the considerations for granting or refusing a Writ of Certiorari expressed in Rule 19 of this Court, only the following are possibly applicable:

> (1) Rule 19, Section 1 (b): where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals in the same matter * * *
>
> (2) Rule 19, Section 1 (b): where a Court of Appeals * * * has decided an important question of federal law which has not been, but should be, settled by this Court * * *
>
> (3) Rule 19, Section 1 (b): where a Court of Appeals * * * has decided a federal question in a way in conflict with the applicable decisions of this Court * * *

Respondent submits that none of the policy reasons expressed in Rule 19 apply despite Petitioner's desperate striving to bring himself within the Rule and that the petition for certiorari should be denied.

The ordinary factual questions presented in cargo damage cases are not worthy of the time of this Court which has established the rule that an Appellate Court in Admiralty will not disturb the findings of the Trial Court unless they are "clearly erroneous." *McAllister v. United States*, 348 U.S. 19 (1954); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Morales v. City of Galveston*, *supra*.

The courts below searchingly examined the evidence and reached the same result and conclusion and a further review by this Court would serve no purpose whatsoever.

I. Seaworthiness is a factual question. The issue of whether a vessel must be equipped with transitional navigational devices in order to be seaworthy is a factual one like questions of seaworthiness generally. *Luckenbach* v. *W. J. McCahan, supra; Mahnich* v. *Southern SS Co., supra; Morales* v. *City of Galveston, supra*, and the determination of a particular factual issue is of little importance to the development of the maritime law. Despite Petitioner's attempts to dramatize the issue (Petitioner's Brief 5) no question of personal injury enters into the case; the claim is for loss of cargo and Petitioner's concern for the "lives of their masters and crew" is touching but inappropriate.

The Trial Court did not enunciate the proposition that "new navigational devices become essential to the seaworthiness of a vessel only upon proof of custom and practice in the industry to use them" (Petitioner's Brief 5) as Petitioner is well aware from the language of the Trial Court's opinion.

The Petitioner apparently attempting to rely on *Salem* v. *U. S. Lines Co.*, 370 U.S. 31, asserts that the Trial Court's decision is a "dangerous innovation" and "inconsistent" with this Court's decision in the *Salem* case (Petitioner's Brief 5).

The statement relied on by Petitioner in the *Salem*

case was made by this Court with reference to the question of the use of expert testimony in the determination of the necessity of certain devices in order for a vessel to be seaworthy:

> "The value of an expert's testimony to explain what the best safety device might be is clear but the question is simply whether some such device should have been provided. * * * *Nor would expert testimony about customary equipage be essential* * * * *nor, even if offered would it have concluded the question of unseaworthiness or negligence.*" (Emphasis supplied).

The implication of this Court's footnote statement in the *Salem* case is that expert testimony of customary equipage could be received but would not conclude the trier of fact upon the issue of seaworthiness. The Courts below clearly followed the decision of this Court in *Salem*. No claim has ever been made in this case that custom and usage is a "criterion of seaworthiness" as asserted by Petitioner (Petitioner's Brief, p. 6).

The Trial Court clearly recognized that custom and usage was not determinative of the issue of seaworthiness when it stated in referring to Judge Learned Hand's opinion *The T. J. HOOPER*, 60 F.2d 37 (C.A. 2, 1932):

> "* * * I believe in Judge Hand's truism that courts must in the end fix the standards of what is or is not a seaworthy ship."

The Trial Court recognized and followed this Court's decision in *Salem* v. *U. S. Lines Co.* by stating:

> "The ultimate conclusion of seaworthiness is for the trier of the facts rather than experts."

Respondent submits that no one can read the opinion of the Trial Court which was affirmed per curiam and adopted by the Court of Appeals and conclude that the Courts below failed to follow the "traditional test of seaworthiness" (Petitioner's Brief 6). To be seaworthy, a vessel must be reasonably fit for the voyage undertaken, considering all of the circumstance surrounding the voyage. *Martin* v. *Southwark*, 191 U.S. 1, 3 (1903); *Mitchell* v. *The TRAWLER RACER, INC.*, 362 U.S. 539, 550 (1960).

No claim has ever been made in this case that custom and usage is a criterion of seaworthiness. However, no contention can be made that custom and usage are improper elements for consideration in reaching the ultimate fact of seaworthiness when custom is considered together with the myriad factors which coalesce to make up the circumstances of the voyage. *Boudoin* v. *Lykes Bros. SS Co., supra; Metropolitan Coal Co.* v. *Howard, supra; United States Steel Products Co.* v. *American and Foreign Insurance Co., supra.*

The Trial Court did not hold that radar or loran were unnecessary for safe voyages, absent industry custom. The opinion of the District Court adopted in its entirety by the Court of Appeals stated:

> "It is my considered judgment that the employment of radar in connection with the navigation of tramp steamers under the facts and circumstances is still in a period of transition and at the time of this occurrence was not so essential to navigation that its absence would rise to a finding of unseaworthiness. I make the same finding with reference to the absence of loran."

It is a gross distortion to attribute to the Trial Court's decision the notion that customary practice dictates seaworthiness: custom and practice was considered because the parties introduced evidence on that subject, it was not the concluding factor in the Court's decision as a cursory reading of the opinion would indicate.

In support of the statement that industry practice is not determinative of seaworthiness, Petitioner cites *Davis* v. *Parkhill-Goodloe Company*, 302 F.2d 489 (C.A. 5, 1962), a civil action for the death of a young seaman. In *Davis* the Court considered the industry custom of safety devices as strong evidence against the shipowner saying at page 493:

> "* * * This was not offered, nor is it used by us, to establish a private standard of care as though the suit was for breach of the implied agreement to carry out these precautions. It was offered, *and it is so considered by us, as spectacular proof of industry wide acceptance of the need for extraordinary care in protecting against the various hazards here prevailing. Custom and practice, especially of prudence, is, of course, relevant and significant, in equating conduct with that of the law's fictional ordinarily careful shipowner.*" (Emphasis supplied)

In other words, the Court considered as relevant the evidence of industry in its practice in determining under all of the circumstances whether a seaworthy vessel had been provided.

Petitioner cites *Rodriguez* v. *Coastal Ship Corp.*, 1963 Am. Mar. Cas. 1825 (S.D. N.Y. 1962). Once again a careful reading of the judicial language indicates conformity to precisely the rule applied by the Courts below in this case.

"What an industry does or fails to do while it may have some evidentiary value, does not establish nor diminish the measure of legal duty—an absolute one to supply a seaworthy vessel. *Whether or not the shipowner has measured up to the duty is determined by the trier of the facts upon all of the evidence of a given case and not by the standard set by industry practice.*" (Emphasis supplied)

Respondent submits that it is clear that Petitioner misconstrues the decision of the Trial Court and the Court of Appeals and in doing so finds far reaching importance in a "decision" which the Courts below did not make. Petitioner's own authorities, carefully examined, show clearly that the District Court properly considered the evidence of custom and usage with regard to modern transitional navigational aids. The essence of the Trial Court's decision was a factual determination under all of the circumstances that the lack of certain transitional navigational aids did not render the vessel unseaworthy.

II. The decision of the Courts below does not conflict with the decisions of any other Circuit.

Petitioner erroneously contends that the decisions of the Courts below conflicts with the Second Circuit Decision in *The T. J. HOOPER*, 60 F.2d 737 (C.A. 2, 1932), and implores this Court to resolve the "conflict." The simple truth of the matter is that there is no conflict of Circuits on this issue. The decision of the Trial Court was, under all of the circumstances, that the PORTLAND TRADER was not unseaworthy by reason of lack of radar or loran and Respondent submits that the

Petitioner cites no decision in conflict therewith for the very simple reason that no decision in conflict exists. Indeed the only decision in point other than the decision of the Courts below is *Anglo-Saxon Petroleum Co. v. United States*, 88 Fed. Supp. 158 (D.C. Mass. 1950), and in that case it was held that a vessel without radar was not, for that reason, unseaworthy; there is dictum to the same effect in *Timur Fishing Corp. v. The Capt. Bill*, 160 F. Supp. 563 (D.C. Mass. 1958).

The *T. J. HOOPER* held that under the circumstances of the case presented the failure to equip a tug in 1932 some 32 years after the advent of radio with operational radio equipment rendered the vessel unseaworthy. During the course of the opinion Judge Learned Hand examined the role of custom and usage, both generally and in the field of navigation; he emphasized that reasonable prudence was often common prudence and in no place did he find that evidence of custom was irrelevant to a factual determination of seaworthiness.

Neither Judge Learned Hand or the Trial Court in this case followed or countenanced any such rule as Petitioner asserts (Petitioner's Brief 7) viz. that a navigational device can be essential to seaworthiness only where its use is customary. Respondent points out that in the fairly recent case of *Hendry Corporation v. Aircraft Rescue Vessels*, 113 Fed. Supp. 198 (D.C. La. 1953), the Court held that the absence of radio aboard a vessel did not, as a matter of law, render it unseaworthy. Also it would appear that perhaps *The T. J. HOOPER* decision is no longer the law in the circuit of

its origin. *Nuzzo* v. *Rederi*, 304 F.2d 506, 510 (C.A. 2 1962).

To deny certiorari in this case would not retard progress in the development of an adoption of modern navigational aids (Petitioner's Brief 8) where this Court has clearly established that seaworthiness is a question of fact to be determined from the totality of the evidence presented in each case. *Luckenbach* v. *W. J. McCahan*; *Mahnich* v. *Southern SS Co.*, *supra*; *Morales* v. *City of Galveston*, *supra*.

It is pure sophistry to assert that "The Supreme Court must examine the need for radar and loran in known dangerous waters where no aids to navigation are maintained." (Petitioner's Brief 8). This assumes, without foundation, that no aid to navigation was to be found aboard the PORTLAND TRADER. On the contrary, the evidence clearly showed that the PORTLAND TRADER was equipped with all of the known and time-honored traditional navigational aids and that she was traversing the Sulu Sea on a recognized and recommended steamer route.

Petitioner further contends that the finding of the Trial Court is inconsistent with the "established rule that the failure to use radar, if available, is gross fault." (Petitioner's Brief 8).

Petitioner's quotation of the so-called rule refers to radar "if available" and obviously this so-called rule has no applicability where the vessel is not in the first instance equipped with radar.

This Court under Rule 19 has made abundantly clear the considerations for the granting or refusing of a writ of certiorari and in this case there is absolutely no "conflict" with the decision of another Court of Appeals; no "important question of Federal law" and no "conflict" with the applicable decisions of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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